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No. 00-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD PAGAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

John W. Mitchell, Esq.
Counsel of Record
41 Madison Avenue
New York, New York 10010
(212) 696-9500

Attorney for Ronald Pagan

94pp

QUESTIONS PRESENTED

Whether 18 U.S.C. §1959, the "Violent Crimes In Aid Of Racketeering" statute ("VCAR"), is unconstitutionally vague on its face and as applied to Petitioner.

Whether VCAR is unconstitutional on its face and/or as applied to Petitioner, in that the fundamental premise upon which federal jurisdiction was based is flawed, and moreover, Congress does not have the power to extend federal jurisdiction to non-economic violent crimes that do not, in themselves, substantially affect interstate commerce.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Rubin Feliciano and Nelson Gonzalez were co-defendants of Petitioner at trial, and the court of appeals affirmed their convictions in the same opinion in which it affirmed Petitioner's appeal.

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In the Supreme Court of the United States

No.

RONALD PAGAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Ronald Pagan, respectfully petitions for writ of certiorari to review the judgement of the United States Court Of Appeals For The Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, A -1 to A- 52) is reported as United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000).

JURISDICTION

The judgement of the court of appeals was entered on August 16, 2000. Petitions for rehearing were denied on November 13, 2000. (A - 53) The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution, the "Commerce Clause," provides: "The Congress shall have the Power to... regulate Commerce with...and among the several states."

The First Amendment to the United States Constitution provides in relevant part that: "Congress shall make no law...abridging the freedom of speech, or the right of the people peacefully to assemble..."

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions the accused shall be...informed of the nature and cause of the accusation..."

The Fourteenth Amendment to the United States Constitution provides in relevant part that: "All persons [shall enjoy] the equal protection of the laws."

STATEMENT OF THE CASE

On February 2, 1999, following trial to a jury in the United States District Court for the District of Connecticut, Petitioner was convicted of one count of committing a Violent

Crime In Aid Of Racketeering (Conspiracy to Commit Murder) in violation of 18 U.S.C. §1959 (a)(5), one count of committing a Violent Crime In Aid Of Racketeering (Murder) and Aiding and Abetting in violation of 18 U.S.C. §1959 (a)(1) and 2, and one count of Using or Carrying A Firearm During And In Relation to a Crime of Violence and Aiding and Abetting in violation of 18 U.S.C. §924 (c)(1) and 2.

Petitioner Pagan, said to be a member of a gang known as the "Los Solidos," was convicted of being an accomplice to a gang related killing on March 24, 1997 in Meriden, Connecticut. The victim, Edwin Ramos, was a newly initiated member of the "Los Solidos," and according to the government's evidence, was killed as the result of an intra-gang dispute. Ramos, a former member of a rival gang, the "Latin Kings," had been given a gun and a bullet proof vest by Nelson Gonzalez, the president of the Los Solidos' Meriden chapter so that he might protect himself from possible retaliation by Latin King members. However, Ramos soon thereafter sold the gun and vest to by narcotics for himself. When these facts were discovered by Gonzalez he ordered Rubin Feliciano, another member of the Solidos to kill Ramos.

On the evening of March 24, 1997, Feliciano accompanied by Alex Rivera and the Petitioner picked up Alex Rivera. They drove around for a while talking and taking drugs. Eventually, they stopped the car in a remote area. All four men exited the automobile and began talking. Soon thereafter, Feliciano confronted Ramos and asked him what he had done with the gun that Gonzalez had given him. Ramos said he didn't know, that he might have lost it. With that, Feliciano pulled his gun and shot Ramos once. Ramos died from the

gunshot wound.

When the trial court charged the jury, it gave the following instruction, over defense objection, on the interstate commerce element of VCAR;

> The third element that you must find beyond a reasonable doubt is that the enterprise itself, namely the Los Solidos, or the racketeering activities of those associated with it, had some effect upon interstate or foreign commerce. **The effect on interstate or foreign commerce could have occurred in any way, and it need only be minimal**. It is not necessary that you find that a substantial affect on interstate or foreign commerce occurred...**So long as the activities in furtherance of the enterprise affected interstate or foreign commerce in some minimal way, you may find that this element has been satisfied**. It is sufficient, for example, that in the course of the racketeering activities, members of the enterprise sold narcotics. (emphasis supplied)

On appeal, Petitioner argued that the VCAR statute was unconstitutionally vague, both on its face and as applied. In addition, Petitioner argued that the interstate commerce element of VCAR was unconstitutional on its face and as applied. The arguments were rejected by the court of appeals.

REASONS FOR GRANTING THE PETITION

I. The VCAR Statute Is Unconstitutional On its Face, In That It Fails To Provide Sufficient Notice Of What Conduct Is Prohibited, And It Was Unconstitutionally Applied In The Underlying Prosecution And Appeal

An independent and indispensable element of VCAR, which the government must prove beyond a reasonable doubt, is that the predicate act of violence allegedly committed by the person charged - was committed either in consideration of something of pecuniary value or in order to gain entrance to or maintain or increase his position in - "**an enterprise engaged in racketeering activity**." United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992), ["the government (is) required to prove beyond a reasonable doubt... that the enterprise was engaged in racketeering activity as defined in RICO."]

It is this VCAR element, that the enterprise must be "engaged in racketeering activity," which creates truly insoluble problems of statutory construction and application. Simply put, the reason that the VCAR statute is constitutionally vague on its face, is because it is quite literally impossible to tell from the language of the statute what proof is required to satisfy this element. As will be demonstrated below, VCAR "fails to establish any, much less legally adequate, (1) relational, (2) qantifiable, or (3) temporal standards. Accordingly, it is so vague and that it leaves the public uncertain as to the conduct it prohibits, and is inadequate to "guard against the arbitrary deprivation of liberty interests." As a result, the statute fails to

pass constitutional muster. See, Chicago v. Morales, 527 U.S. 41, 56 -57, 119 S. Ct. 1849 (1999)

In enacting VCAR, it is quite clear that what its proponents really sought to create (and this assertion is readily confirmed by its legislative history, see n. 5, infra) was a statute that criminalized the commission of a violent crime in connection with an *organized crime enterprise*. However for cogent reasons (see, n. 4, infra), VCAR's supporters felt such a statute would be unconstitutional. Accordingly, they attempted to do indirectly what they could not do directly. Thus emerged the incongruous concept of an "enterprise engaged in racketeering activity," (read - "*organized crime enterprise*"). Not surprisingly, VCAR - a mutation of RICO - became the quintessential "camel" - "a horse designed by a committee."

a. **VCAR Is Constitutionally Vague Because It Fails To Define How The Various Elements Thereof Must Relate To One Another.**

Beginning with the "relational" deficiencies of the VCAR, the first question that emerges is whose racketeering act(s) count in determining whether the enterprise is engaged in racketeering activity. That is to say, an "enterprise"as a theoretical construct, does not itself engage in racketeering acts, someone must do so on its behalf.[1] Thus, the first problem

[1] As the court noted in United States v. Private Sanitation Industry Ass'n., 793 F.Supp. 1114, 1128 (E.D.N.Y. 1992); "At this point a threshold observation must be made about *United States v. Minicone, 960 F.2d 1099 (2d Cir. 1992)*, cert. denied, -- *U.S. --, 112 S. Ct. 1511, 117 L. Ed. 2d 648*

which is manifest, is that it is impossible to tell from the statute what the required "relationship" must be between an enterprise and an individual somehow associated therewith, in order for that individual's racketeering act(s) to be properly included in the calculus for determining whether the "enterprise was engaged in racketeering activity."

This statutory defect presents a situation not unlike that faced in interpreting the provisions of the RICO statute, as to who was legally capable of "conducting the affairs" of an enterprise. In Reves v. Ernst & Young, 507 U.S. 170, 177, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993) this Court reasoned that in order to "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs," it was only those person(s) capable of influencing the "operation and management" of the enterprise that had sufficient relationship to the enterprise to have the capacity to direct its affairs.

Not surprisingly, this "operation and management" test, crafted by the Court in Reves, is akin to generally accepted standards as to whose individual acts can be imputed to, and thereby result in, criminal liability to corporation.[2]

(1992). There, the Second Circuit stated that 'proof of a RICO violation pursuant to § 1962(c) requires a showing that an "enterprise" engaged in a "pattern" of racketeering activity'... This statement is almost certainly an inadvertence: Section 1962(c) declares it illegal for a person - not for an enterprise - to engage in a pattern of racketeering activity."

[2] As the court in Grace v. Nissan, 76 F. Supp. 2d 1083, 1088 n.10 (D. Ore. 1999) observed, the standard of corporate criminal liability set forth in the American Law Institute's Model Penal Code, adopted in principle by twenty one states, is that : "(1) A corporation may be convicted

The next "relational" defect of VCAR derives from the absence of any requirement of a relationship between a racketeering act and the enterprise. That is to say, even if a qualifying "racketeering act" was committed by someone who was sufficiently "related" to the enterprise for such act to be considered, how must that act nonetheless relate to the enterprise itself. Under RICO, we know for a racketeering act to qualify for inclusion in a "pattern of racketeering activity" it must demonstrate two attributes. First, it must be "horizontally related" to the other acts said to make up the pattern. Second, it must be "vertically related" to the enterprise. [3]

However under VCAR, there is no way to determine what relationship a racketeering act must have to the enterprise in order for it to be included for the purpose of determining whether the enterprise was "engaged in racketeering activity."

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of the commission of an offense if... (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. American Law Institute, Model Penal Code § 2.07(c)."

[3] As the Court in United States v. Long, 917 F.2d 691 (2d Cir. 1990)explained: "under Indelicato and H.J. Inc....the government must prove that two racketeering acts were related to each other ("horizontal relatedness"), as well as related to the enterprise ("vertical relatedness") and that they resulted in or posed a threat of continuity of the criminal activity." Id. at 697; accord United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir. 1989); United States v. Persico, CR-92-00351 (CPS), 1994 U.S. Dist. LEXIS 928 (E.D.N.Y. 1994); United States v. Local 1804-1, 812 F. Supp. 1303, 1315 (S.D.N.Y. 1993).

The real problems created by the lack of any relational standard between the act and the enterprise was amply demonstrated in the trial below. Defense counsel asked the trial court to instruct the jury that a racketeering act committed by someone who was purportedly a member of Los Solidos, but who committed the racketeering act for his own ends rather than in furtherance of the affairs of the enterprise, should not be considered. The trial court refused the limiting instruction.

On appeal, it is most respectfully asserted that the effort of the Court of Appeals to explain why the requested limiting instruction should not have been given, if anything, dramatically underscores just how vague VCAR is. (see, A - 25 to A - 29).

The third "relational" defect of VCAR concerns its lack of any requirement that the "racketeering acts" bear any relation to the defendant. Petitioner does not argue here that the defendant must himself commit any of racketeering act(s) - indeed the underlying violent predicate act specifically does not count toward the element that the enterprise must be engaged in racketeering activity. But for the reasons explained below there must be at a minimum, at least some knowledge of, some foreseeability, some relation between, the VCAR defendant and the racketeering acts of the enterprise.

The fact is however, under VCAR there is no requirement that the defendant being prosecuted know of, or even reasonably foresee, the commission of any racketeering act(s) by anyone associated with the enterprise - even though it is an element of the offense for which he is being prosecuted. And, since the VCAR defendant need not know of or foresee the commission of such acts, they need be part of any criminal

objective or venture that the defendant has agreed to join or advance. As a result, there is imposed upon a VCAR defendant vicarious liability for the criminal acts of others, which relate not to him, but rather exclusively to the enterprise.

In this regard, analyzing the unique mechanisms of VCAR, one finds that the statute actually creates two separate *actus reus* requirements. The first being the defendant's *actus reus,* to wit; his intentional commission of the underlying violent crime in exchange for something of pecuniary value or to gain entrance to the enterprise. The second *actus reus* requirement is that of someone other than the defendant intentionally commit a racketeering act(s).

Although there exist other statutes in which the conduct of someone other than the defendant can serve as a basis of his criminal liability - for example, a conspiracy statute or an aiding and abetting statute - there is a critical difference between liability for those offenses and for VCAR. Liability to the defendant in a conspiracy or aiding and abetting context only obtains if the defendant himself has knowingly agreed to join some form of criminal partnership and the conduct of the other person (whether the defendant knows the existence of all such other co-conspirator or not) is nonetheless; (1) known to or reasonably foreseeable to the defendant, and (2) in furtherance of a criminal agreement the defendant has entered into and endeavored to advance the goals of.

Conversely, under VCAR, liability for an indispensable element of the offense - that the "enterprise was engaged in racketeering activity" - can be proven on the basis of the conduct of another; (1) who the defendant may very well never have known of or reasonably foreseen; (2) and who committed

acts that the defendant never agreed to, knew of, or reasonably foresaw. Even if VCAR were a conspiracy statute, which it is not, under traditional conspiracy doctrine a defendant cannot be vicariously liable for any crimes beyond the reasonably foreseeable parameters of his conspiratorial agreement. And since VCAR enterprises can be entire lawful entities, such as a corporation, there is no argument for any form of "constructive knowledge" - even if criminal liability could be predicated upon such a standard, which is highly unlikely.

Once again, comparing VCAR to RICO, it is significant to note that under RICO there is no vicarious liability created between RICO co-defendants for their respective racketeering acts. As the Court in United States v. Bonnano Organized Crime Family, 683 F. Supp. 1411, 1429 (E.D.N.Y. 1988), explained:

> The defendants' alleged association with the Bonanno Organized Crime Family alone is not sufficient to attribute to each defendant all of the predicate acts. Congress specifically declined to make mere membership in an organized crime organization a RICO offense...(citations omitted) As stated in United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), "the focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise."

In fact, when the proposed RICO statute was being debated by the Congress, serious questions were raised over whether, by passing RICO, the legislature would in effect be

creating a "status" crime.[4] Not surprisingly, on a number of occasions, and in a number of different factual contexts, RICO was challenged on this basis. Such challenges were typically predicated upon the contention that RICO's criminal liability impermissibly depended upon a person's "status"or "association" with a particular group or enterprise.

While these issues were taken quite seriously by the courts that initially dealt with them, the argument was ultimately rejected upon the reasoning that RICO did not actually punish "status" or "membership," but rather the individual conduct of the accused. "A defendant must be convicted on the basis of his own proven conduct, association is not enough. RICO does not punish 'mere association with conspirators or knowledge of (their) illegal activities; its

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[4] As noted in Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 n. 17 (2d Cir. 1983). "During the House debates on RICO, Congressman Biaggi proposed an amendment that sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. 116 Cong. Rec. 35,343 (1970). The amendment was vigorously attacked on constitutional grounds. Congressman Celler objected that such terms were "imprecise, uncertain, and unclear" and that mere membership in an organization should not be punished. Id. at 35,343-44 (1970). Congressman Poff (the bill's sponsor in the House) objected that such an amendment might violate the Supreme Court's rulings that struck down statutes which created status offenses, such as *Scales v. United States, 367 U.S. 203, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961)*, and *Robinson v. California, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962)*. 116 Cong. Rec. 35,344 (1970). Congress rejected the amendment. 116 Cong. Rec. 35,346 (1970); see Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime 59-105 (G.R. Blakey ed. 1980)." See also, H.J. Inc. v. Northwestern Bell Telephone Company, infra at 492 U.S. 245-249

proscriptions are against conduct not status.'" United States v. To, 144 F.3d 737, 746 (11th Cir. 1998); United States v. Gonzalez, 921 F.2d 1530, 1542 (11th Cir. 1991) ["RICO does not punish mere association with conspirators or knowledge of illegal activities."]; United States v. Bonanno Organized Crime Family, supra at 1429 ["The defendants' alleged association with the Bonanno organized crime family alone is not sufficient to attribute to each defendant all the predicate acts."].

However unlike RICO, VCAR was expressly designed to predicate liability upon a defendant's association and status. As the legislative history confirms:

> **Federal jurisdiction [under VCAR] should be asserted selectively based upon such factors as the type of the defendants reasonably believed to be involved...For example, the apparent involvement of organized crime figures...could indicate that Federal action was appropriate** (Id. at 3484) [5]
>
> * * *
>
> **Section 1952B (renumbered in 1988 as 18 U.S.C. §1959) proscribes contract murders and other violent crimes by organized crime figures.** Such crimes frequently do not involve interstate travel or the use of interstate facilities and are sometimes not performed for money or other pecuniary benefit, but rather **as an aspect of membership in a criminal organization**. (Id. at 3486)(emphasis supplied)

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[5] See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483-3487.

Thus, while VCAR seeks in part to criminalize the commission of the defendant's underlying violent crime, the single element that transforms a garden variety violent crime into a VCAR prosecution, is the defendant's association with the enterprise (and/or its members). Clearly then, under VCAR, the *sine qua non* is association with members of an enterprise that have committed unrelated criminal conduct. Because VCAR makes an individual liable for prosecution on the basis of his association with others, the statute violates the First Amendment and the Equal Protection Clause.

At this juncture it is perhaps well served to note that it is probably true that a defendant can be convicted of a federal crime without necessarily knowing all (or perhaps even any) of the facts giving rise to the so-called "jurisdictional element" of the offense.[6] However, the jurisdictional element of VCAR is

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[6] Some jurists would argue that this proposition is open to question. For example as Judge Merritt observed in his dissenting opinion in United States v. Gibson, 881 F.2d 318, 323-324 (6th Cir. 1989): "I recognize that it is often hazardous for lower federal courts to predict that the Supreme Court will reverse a 5-4 opinion [referring to the Court's opinion in United States v. Yermian, 468 U.S. 63 (1984)], but such a prediction does not require much of a leap of faith in this case. Chief Justice Rehnquist's prediction of significant confusion in the lower courts has come to pass. After Yermian, the Supreme Court has reiterated in Liparota [471 U.S. 419 (1985)] its reservations with respect to the knowledge requirement of the jurisdictional element, and in Tanner [483 U.S. 107 (1987)] it has held that the government must be the known target in § 371 fraud-against-the-government cases. The five justice majority in Yermian is no longer intact since two members of the majority are no longer on the Court, but the four dissenting members of the Court remain. Therefore, I do not think Yermian is still good law and would reverse Gibson's conviction."

the requirement that the government prove that the enterprise was "engaged in, or the activities of which affect[ed], interstate of foreign commerce."(See. §1959 [b][2]) The separate element, that the enterprise was "engaged in racketeering activity,"is a substantive element unrelated to the jurisdictional element of the statute. Accordingly, a knowing, culpable mental state must be demonstrated as to that element. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240 (1952); Staples v. United States, 511 U.S. 600, 619-20, 114 S. Ct. 1793 (1994); United States v. X-Citement Video, Inc., 513 U.S. 64, 70-73, 115 S. Ct. 464, 467 (1994).

b. VCAR Is Unconstitutionally Vague Because It Fails to Provide Sufficient Notice Of How Many "Racketeering Acts" Must Be Committed And/Or By How Many People Associated With The Enterprise, Before The Enterprise Can Be Said To Be "Engaged In Racketeering Activity."

VCAR provides no reference whatever as to how many racketeering acts must be proven, and/or how many members of the purported enterprise must commit such acts in order to establish that the "enterprise was engaged in racketeering activity." Yet again, this defect raises problems not dissimilar to those presented by RICO. (See, H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 109 S.Ct. 2732 [1989], and this Court's discussion of the quantitative requirements of a "pattern of racketeering activity").

To demonstrate just how real this problem is with regard to VCAR, consider the divergence of opinion (and/or inability to define the parameters of this element) revealed in the four

decisions discussed below.

Beginning with the opinion in United States v. Soler, ___F.Supp2d___, 1998 U.S. Dist. LEXIS 1998 (S.D.N.Y. 1998), the defendant had argued that the government had to prove the commission of "predicate acts" (plural) in order to establish that the enterprise was in fact "engaged in racketeering activity." Rejecting the defendant's argument, the district court went on to hold that not only was it unnecessary for the government to prove that the enterprise had committed a "pattern or racketeering activity," but it was not even necessary to prove that anyone connected with the enterprise ever committed even a single "racketeering act." As the court stated:

> During the trial, the parties discussed whether the Government was required to prove predicate acts under § 1959. The Government argued that such proof was not necessary... **This Court agreed, based on the plan language of the statute, that proof of a predicate act...was not necessary.**
>
> Following the trial, Soler filed a letter, pro se, in which he argued that the Court failed to instruct the jury of the need to find the commission of predicate acts of racketeering activity in order to convict under § 1959. In an opinion dated December 24, 1996, this Court rejected Soler's argument.
>
> "Predicate acts" are a necessary element of an 18 U.S.C. §1962 (a)-(c) charge, which forbids a variety of actions conducted through a "pattern of racketeering activity."

> Section 1959, by contrast, outlaws violent crime committed in order to gain membership or increase one's position in "an enterprise engaged in racketeering activity." **Because Section 1959 does not require a "pattern" of racketeering activity, it does not require that the government prove [any] predicate acts."** (emphasis supplied)

It is noted parenthetically that Petitioner agrees that there is no requirement within the VCAR statute that a "pattern" of racketeering activity be proven, he does assert however that some number of racketeering acts, possessing some attributes of relationship and continuity must be required, and that the failure of VCAR to set forth these requirements renders the statute impermissibly vague.

Next, is the decision in United States v. Cutolo, 861 F.Supp. 1142, 1146 (E.D.N.Y. 1994). Most respectfully, the court in Cutolo, having once recognized the problem, essentially side stepped it. As the district court wrote:

> §1959 does not spell out how many crimes must be committed and by whom to satisfy that section's prerequisite that the "enterprise" be "engaged" in such activity...Presumably §1959 does not apply where such persons committed only a single crime. The word "engaged" implies more than that.

The third court to comment upon VCAR's lack of any quantifiable standards to which one might refer in order to determine how many racketeering acts had to be committed before it could be said that the "enterprise was engaged in racketeering activity," was the decision in United States v. Booth, ___F.Supp.2d___, 1999 U.S. Dist. LEXIS 19190 (S.D.N.Y. 1999). In Booth, like Cutolo, the court acknowledged this self-evident defect in the statute, yet it too, offered no solution. As the court noted:

> Booth also argues that § 1959 is unconstitutionally vague because the phrase 'enterprise engaged in racketeering activity' is under-defined. '[U]nlike RICO,' he argues, 'VCAR fails to provide any quantifiable language which would provide a defendant, a court or most importantly, a petit jury, with a reliable (and consistent) basis upon which to determine when... 'the government has proved that an 'enterprise [was] engaged in racketeering activity.' He cites, by way of contrast, the continuity and relatedness requirements that courts have developed as interpretations of RICO's requirement of a 'pattern' of racketeering activity. Booth argues that the absence of similar limiting constructions in the VCAR context deprives him, as well as all other potential defendants, of adequate notice as to what is prohibited and exposes them to the risk of arbitrary enforcement.
>
> **Similarly, here, Booth is correct to note that § 1959 fails to impose either quantifiable, or temporal,**

requirements in defining when an enterprise is engaged in racketeering activity. But we do not believe that the Constitution requires it to do so. The text of the statute indicates that Congress intended to include any of the enumerated violent acts committed at the behest of, or to gain or maintain a position in, **any enterprise at least some of whose members are engaged in at least some racketeering activity.**[7] **Although this, too, might be broad, we do not believe that it is vague.**(emphasis supplied)

The fourth and final discussion of the failure of VCAR to provide any quantifiable standards in terms of the number of

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[7] The district court's conclusions in Booth, that when Congress enacted the VCAR element that the enterprise had to be "engaged in racketeering activity" it purposely did so to make that element as broad as possible, is not confirmed by the legislative history.(See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483.) But regardless, it is not the Congress who is the final arbiter of whether a statute provides sufficient constitutional "notice."As this Court noted in United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000): "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text. As we emphasized in United States v. Nixon, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974), 'In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others ...Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury...that 'it is emphatically the province and duty of the judicial department to say what the law is.'" Id. 120 S.Ct. at 1753.

racketeering acts that need be proved is the district court's decision in United States v. Garfinkle, 842 F.Supp 1284, 1291-1292, aff'd United States v. Bracy, 67 F.3d 1421, 1429 (9th Cir. 1995).

In Garfinkle the court began by also acknowledging that the VCAR element that the enterprise must be "engaged in racketeering activity," cannot be determined by reference to the statute:

> There is no statutory definition of the phrase "engaged in" racketeering activity. Nor could we find any case law directly on point. The treatment of the phrase "engaged in" in the case law, suggests that the courts have not yet given a strict or limited definition but have allowed the phrase its ordinary meaning...
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> * * *
>
> The language regarding 'an enterprise engaged in racketeering activity' should be construed to require some proof that the enterprise as an entity is engaged in racketeering activity, or generally that its members and associates are engaged in racketeering activity in such a way that it can be attributed to the enterprise.

In the four decisions above - that have attempted to determine how many racketeering acts must be committed before it can be said that the "enterprise was engaged in racketeering activity" - one court says than no racketeering acts need be proven, and three courts fundamentally admit that, semantics aside, they have no idea. Thus as Soler, Cutolo, Booth, and Garfinkle fairly demonstrate, even federal judges

well versed in the operation and application of complex multi-element federal criminal statutes, not only concede that this VCAR element cannot be defined by reference to the statute, but most respectfully, cannot reach consensus or even offer an reasonable explanation of how the element ought to be construed or applied. Yet these are the very judges that must explain and instruct lay juries on how they are to apply VCAR in determining a person's guilt or innocence. That at least four federal district court judges cannot say with any degree of certainty what evidence is legally and/or factually sufficient to establish the VCAR element that the enterprise is "engaged in racketeering activity," makes a compelling case for the finding that VCAR is constitutionally vague.

c. VCAR is Constitutionally Vague Because It Provides No Temporal Parameters.

At the risk of overstating one's position, assume that 15 years ago, a member of some otherwise legitimate enterprise - a corporation for example - committed a single violation of 18 U.S.C. §1544 (Misuse of a Passport - a racketeering predicate under §1961[1][B]). One could argue, and there is nothing in VCAR to the contrary, that "enterprise"was an "enterprise engaged in racketeering activity." This is so because there are no temporal restrictions as to when the racketeering act(s) engaged in by the enterprise must be committed in relation to the underlying VCAR predicate crime.

If one reasons that under VCAR, racketeering acts committed before the predicate violent crime count toward determining whether the enterprise was engaged in racketeering

activity - then how far in the past can the racketeering act(s) be, and still be included in the calculus for this element. Further, must there be some equivalent to the RICO pattern requirements of horizontal, vertical relatedness and/or continuity with respect to such acts. Alternatively, must the enterprise be simultaneously "engaged in racketeering activity," at the time the violent crime is committed (a construction suggested by the language of §1959). Finally, may the necessary racketeering activity take place after the violent predicate act.

Once again, to demonstrate these problems in real case context, consider the opinion in United States v. Garfinkle, supra at 1291-1292, As the district court wrote:

> [O]ur own every day understanding of the word [engaged] lead us to belief that for an enterprise to be 'engaged' in racketeering activity has a more transitory quality than the phrase "pattern of racketeering activity" as defined by the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).* The term 'engaged in' has a temporary quality implying that it is not necessary to find the enterprise is likely to continue to participate in racketeering activities. Nor does the term 'engaged in' require a showing that any racketeering activities conducted by the enterprise are related to each other.
>
> For an 'enterprise' to be 'engaged in' racketeering activity we think it is enough to show that the 'enterprise' is currently involved in the commission of an act of racketeering activity. By this we don't mean

> that the enterprise must be committing an act of racketeering activity at the same exact instant as the underlying crime of violence. **We only mean that the enterprise must have committed or is planning to commit some racketeering activity within a period of time short enough under the circumstances so that it is fair to deem the enterprise as 'engaged in racketeering activity.'**
>
> **Thus, it would be possible for an otherwise legitimate enterprise which engages in a single act of racketeering activity to be deemed 'engaged in racketeering activity' for a short period of time on either side of the actual commission of the racketeering activity...We do not define the outer limits of time during which an 'enterprise' may be fairly said to be 'engaged in' racketeering activity.** (emphasis supplied)

The Court in Garfinkle would find that a defendant could be guilty of VCAR if there was a showing that the enterprise was "*planning to commit* some racketeering activity within a period of time short" of the defendant's violent act. A statute that leads a federal district judge to reach such conclusions, based most respectfully, entirely on his own subjective view as to what would seem reasonable to him, cannot possibly meet constitutional standards.

II. 18 U.S.C. §1959 Is Unconstitutional on its Face, And As It Was Applied In This Case. The Legislative Premise Upon Which Federal Jurisdiction Of VCAR Is Founded Is Flawed.

As the legislative history of VCAR confirms, Congress expressly anchored its assertion of jurisdiction to its contention that the activities of "organized crime" were matters which, in the aggregate, had a sufficient affect upon interstate commerce to justify federal intervention into non-economic violent crimes, traditionally the exclusive bailiwick of state and/or local prosecutors. As Senate Report No. 98-225 sets forth:[13]

> **"[T]he Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities** (Id at 3483)...[T]he Committee concluded that the need for Federal jurisdiction is clear, in view of **the Federal government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises.** (Id. at 3484)... [VCAR] extends to [crimes] committed for anything of

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[13] See, Senate Report No. 98-225; 98th Congress Second Session, 1984 U.S. Code Cong. & Admin. News, 3182, 3483-3487.

pecuniary value or for the purpose of **gaining entrance into or maintaining or increasing one's position in an organized crime group.** Id. 3484)...**Section 1952B [VCAR] proscribes... violent crimes by organized crime figures. Such crimes frequently do not involve interstate travel or the use of interstate facilities and are sometimes not performed for money or other direct pecuniary benefit, but rather as an aspect of membership in a criminal organization.** (Id. 3486) (emphasis supplied)

The fatal defect in the jurisdictional scheme of VCAR however, is that Congress erroneously equated an "enterprise engaged in racketeering activity" as being synonymous with an "organized crime enterprise" (or as it is sometimes described, a "racketeering enterprise"). It did so because it reasoned that the crimes enumerated in §1961 of RICO - so called "racketeering activities" - were the type of crimes that organized crime enterprises "engaged in,"[14] and therefore, by

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[14] This reasoning derived from the conceptual thinking of the proponents of RICO. As the court in United States v. Bledsoe, 674 F.2d 647,662-663 (8th Cir. 1982) noted: "[RICO] was not intended to reach any criminals who merely associate together and perpetrate two of the specified crimes, **rather it was aimed at 'organized crime.'**(Id at 662)...**The statute is an attack on organized crime, but it utilizes a per se approach.** Thus Senator McClellan, the bill's principal sponsor, stated that **the crimes enumerated in the definition of racketeering activity are not committed only by participants in organized crime, but argued that they are 'characteristic of organized crime.** '(emphasis supplied) McClellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?,

incorporating the requirement that the VCAR enterprise had to be "engaged in racketeering activity," the language of the statute ensured that the jurisdictional predicate, - *suppressing the activities of organized criminal enterprises* - would be present in any VCAR prosecution.

This purported jurisdictional footing is in reality a fallacy since there is nothing in the language of the statute that requires, much less guarantees, that the VCAR "enterprise," or the activities thereof, will relate in any way to "organized crime," or the members or activities thereof.

These flaws in both the conceptual basis and operation of the jurisdictional element of VCAR manifested themselves in the instant case. At bar, the Second Circuit upheld VCAR's purported commerce clause jurisdiction precisely upon the premise that; **"it is evident that Congress enacted section 1959 in view of the 'Federal Government's strong interest... in suppressing the activities of organized criminal enterprises'... '[Because] any predicate murder [under1959 must] bear a strong relationship to racketeering activity that affects interstate commerce, it does not risk improperly making purely local crimes a matter of federal concern."** (A - 34 & 35) (emphasis supplied)

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46 Notre Dame Law. 55, 142-43 (1970). McClellan observes: 'The danger that a commission of such offenses by other individuals would subject them to proceedings under title IX is [small]...Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX. Id. at 144." Id at 663

Most respectfully, this reasoning is entirely flawed. First, there is no statutory requirement in VCAR that the jury or anyone else, find any "relationship" (much less a "strong one") between the "predicate murder" (or whatever the particular VCAR predicate act of violence may be) and the enterprise's "racketeering activity." Second, unlike RICO, there is no requirement in VCAR that the "racketeering activity" somehow advance the goals of the enterprise, or that the affairs of the VCAR enterprise be "directly or indirectly...conduct[ed]," through racketeering activity. In fact, as the court in Garfinkel observed; "*it would be possible for an otherwise legitimate enterprise which engages in a single act of racketeering activity to be deemed 'engaged in racketeering activity' for a short period of time..*" So even if one establishes that a particular VCAR "enterprise" was in fact "engaged in racketeering activities," that wouldn't support the necessary corollary that such an enterprise was an "organized crime enterprise," or otherwise engaged in organized crime activities or offenses.

Moreover, the Second Circuit's contention that it is the enterprise's "*racketeering activity that affects interstate commerce,*" is equally unsupportable. There is nothing in the VCAR statute that requires any finding that the "activities of [the enterprise] which affect interstate commerce," are, or must be, the enterprise's "racketeering activities." A finding that a VCAR enterprise's activities affect interstate commerce could be predicated on entirely unrelated, and wholly lawful activities. For example, in a RICO context this Court observed in United States v. Robertson, 514 U.S. 669,672, 115 S. Ct. 1732 (1995), that any corporation that, "engage[s] in the [lawful] production, distribution, or acquisition of goods or services in interstate

commerce," is "engaged in interstate commerce."

For these same reasons, the application of "aggregation theory" in order to find a "substantial affect upon interstate commerce," is not warranted under VCAR. As this Court held in United States v. Morrison, supra., "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Id 667.

Nevertheless, aggregation theory is applied under VCAR[15] on the contention that it is not the predicate noneconomic violent crime(s) that are being aggregated, but the overall effects of the VCAR enterprise's purported organized crime activities. However, as discussed above, since there is no requirement that the basis upon which a VCAR enterprise may be found to affect interstate commerce, or be in any way linked to racketeering activities or organized crime activities, the entire underlying premise collapses under its own weight. Moreover, since the number of racketeering acts necessary to support the element that the enterprise was "engaged in racketeering activity" is not quantified in VCAR - and at least one court has suggested a single act might well satisfy this statutory element - nothing assures that the affect would be anything but *de minimums*. Finally, since there are no temporal

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[15] See, for example, United States v. Riley, 985 F. Supp. 405 (S.D.N.Y. 1997) ["In view of the potential for organized criminal enterprises to affect interstate commerce through their use of violence, I find that there is a rational basis for Congress's determination that violence committed for racketeering enterprises, when viewed in the aggregate, substantially affects interstate commerce." Id. 408]

requirements as to when a racketeering act must occur in relation to either the predicate violent act, or the period when the enterprise was engaged in interstate commerce, the statutory scheme fails for these reasons too.

The second basis upon which the Second Circuit found commerce clause jurisdiction was justified for VCAR, was that; *"[t]he substantial effect requirement is satisfied when criminal statutes contain a jurisdictional element, which ensures through case-by-case inquiry, that the prohibited act affects interstate commerce."* United States v. Torres, 129 F.3d 710, 717 (2d Cir. 1997) See A - 33.

However, the mere fact that a statute may contain its own internal "jurisdictional element," while a matter to be considered in the overall equation, is hardly a conclusive factor - in and of itself - that the conduct that the statute purports to interdict has a sufficiently "substantial affect" on interstate commerce to warrant federal jurisdiction. See, United States v. Rodia, 194 F.3d 465, 472-473 (3rd Cir. 1999) [16]

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[16] As the court in United States v. Corp, 236 F.3d 325, (6th Cir. 20000 noted; "[Even the] government concedes that "the presence of such a jurisdictional requirement does not automatically qualify a statute as constitutional under the Commerce Clause. . . ." A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce. See *Lopez, 514 U.S. at 561* (implying that jurisdictional elements are useful only when they can ensure, through a case-by-case inquiry, that the regulated activity affects interstate commerce); *United States v. Jones, 178 F.3d 479, 480 (7th Cir. 1999)* (noting that the jurisdictional element of

For the reasons set forth above it is respectfully asserted that VCAR is constitutionally vague on its face and as it was applied in the instant case. Moreover, the court lacked jurisdiction to prosecute the defendant for violations of 18 U.S.C. § 1959.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John W. Mitchell
Attorney For The Petitioner,
Ronald Pagan

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§ 844(i), even if proven by the government, did not establish a substantial connection to interstate commerce; and therefore, looking beyond the jurisdictional element to assess the statute's constitutionality)."

APPENDIX A

UNITED STATES OF AMERICA, Appellee, v. RUBEN FELICIANO, a/k/a Rude Dog, a/k/a Roob Dog, Ronald Pagan, a/k/a Twin, and NELSON GONZALEZ, a/k/a Snoop, Defendants-Appellants.
Docket Nos. 99-1289, 99-1290, 99-1318

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

223 F.3d 102; 2000 U.S. App. LEXIS 20930.

June 9, 2000, Argued
August 16, 2000, Decided

SUBSEQUENT HISTORY: As Amended September 29, 2000.

PRIOR HISTORY: Appeal from judgments of conviction entered by United States District Court for the District of Connecticut (Peter C. Dorsey, Senior Judge), after a jury found defendants-appellants Ruben Feliciano, Ronald Pagan, and Nelson Gonzalez guilty of murder and conspiracy to commit murder under 18 U.S.C. § 1959. The jury also found Feliciano guilty of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) and (2), and found Pagan guilty of aiding and abetting Feliciano in the commission of that offense. Defendants-appellants

challenge their convictions on the ground that the district court erred in its conduct of voir dire and because of prejudicial comments made in the prosecutor's rebuttal summation. In addition, they raise several challenges particularly directed to their convictions under 18 U.S.C. § 1959, and Gonzalez raises a challenge to his sentence.

DISPOSITION: Affirmed.

COUNSEL: Karen L. Peck, Assistant United States Attorney (Stephen C. Robinson, United States Attorney for the District of Connecticut, Anthony E. Kaplan, Assistant United States Attorney, of counsel), for Appellee.

Michael O. Sheehan, Sheehan & Reeve, New Haven, CT, for Appellant Ruben Feliciano.

John W. Mitchell, New York, NY, for Appellant Ronald Pagan.

Steven M. Statsinger, Legal Aid Society, Federal Defender Division, New York, NY, for Appellant Nelson Gonzalez.

JUDGES: Before: STRAUB and KATZMANN, Circuit Judges, and HODGES, * District Judge.

* The Honorable Wm. Terrell Hodges, Senior Judge, United States District Court for the Middle District of Florida, sitting by designation.

OPINION BY: KATZMANN

OPINION:

KATZMANN, *Circuit Judge*:

Defendants-appellants Ruben Feliciano ("Feliciano"), Ronald Pagan ("Pagan"), and Nelson Gonzalez ("Gonzalez") appeal from judgments of conviction entered by the United States District Court for the District of Connecticut (Peter C. Dorsey, Senior Judge). At trial in January and February of 1999, Feliciano, Pagan, and Gonzalez, members of a gang known as Los Solidos, were found guilty by a jury of conspiring to murder and murdering 16-year old fellow member Edwin Ramos, in violation of 18 U.S.C. § 1959. Feliciano and Pagan were also found guilty of firearms offenses, in violation of 18 U.S.C. § 924 (c)(1) and (2). On this appeal, appellants do not challenge the sufficiency of the evidence as to their participation in this execution-style murder. Instead, their challenges relate primarily to the fact that their prosecution was conducted by federal, rather than state, authorities under a federal statute, 18 U.S.C. § 1959, which allows federal authorities to prosecute violent crime when those allegedly responsible participated in the violent crime in order to gain, maintain, or increase a position in an enterprise engaged in racketeering activity. See 18 U.S.C. § 1959.

Defendants-appellants claim that the district court erred (1) by conducting portions of voir dire outside their hearing; (2) in instructing the jury that under § 1959, Los Solidos' activities

need only have had a minimal effect on interstate or foreign commerce; and (3) by admitting allegedly improper testimony by law enforcement agents. Defendants-appellants also claim, inter alia, (4) that the evidence at trial was insufficient to show that Los Solidos engaged in racketeering activity, as required by § 1959; (5) that the prosecutor made certain improper and highly prejudicial comments in her rebuttal summation; and (6) that the district court misunderstood its sentencing authority under § 1959. In addition, (7) defendants-appellants for the first time on appeal raise several constitutional challenges to § 1959. We find claims 1 through 6 to be without merit, and that the constitutional claims were waived. Accordingly, we affirm the district court in all respects at issue.

BACKGROUND

On the evening of March 24, 1997, Feliciano, Pagan, and Alex Rivera, members of the Meriden, Connecticut chapter of Los Solidos, a gang with members in Meriden and other Connecticut cities, drove with fellow member Edwin Ramos, aged 16, to a cemetery in Meriden. Upon bringing Ramos to this site, Feliciano, in the morning hours of March 25, shot Ramos in the head. The company then left Ramos' dead or dying body on the cemetery grounds. Because of evidence that the murder was an execution ordered and carried out by members of Los Solidos, a gang that trafficked in drugs in several cities in Connecticut, federal authorities sought to prosecute those allegedly responsible for the murder under 18 U.S.C. § 1959,which prohibits violent crime in aid of racketeering ("VCAR").

On September 1, 1998, a federal grand jury sitting in New Haven, Connecticut, returned a superseding indictment against Feliciano, Pagan, and Gonzalez. All three were charged in Count One with conspiring to commit a violent crime (the murder of Ramos) in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), and, in Count Two, with committing a violent crime in aid of racketeering, and aiding and abetting, in violation of 18 U.S.C. § 1959(a)(1) and (2). Feliciano and Pagan were charged in Count Three, respectively, with using and carrying a firearm during and in relation to a crime of violence, and aiding and abetting, in violation of 18 U.S.C. § 924(c)(1) and (2).

Trial was held in New Haven before the Honorable Peter C. Dorsey, Senior United States District Judge for the District of Connecticut. On January 4, 1999, venire persons were assembled for possible service with respect to four trials - the trial for the case at hand, two other criminal trials (one with two defendants, the other with one defendant), and a civil rights action brought by a pro se prison inmate. During the selection process, the venire persons available for these trials were present together in the same courtroom with the defendants in the three criminal trials and the inmate plaintiff -- a situation that caused some concern to the marshals responsible for security. n1

n1 In the course of the proceedings, the one-defendant criminal case was disposed of by plea.

During the two days of voir dire, the venire persons were asked many questions in open court, with all three defendants in the instant case present from the beginning and throughout, and able to observe the venire members and hear their responses. For example, at the beginning of voir dire, the venire members available for all trials responded orally in open court to some written questions previously presented to them, such as: whether they or anyone close to them had been victims of, or charged with, a crime; whether they had close ties to law enforcement; and whether they or their families or friends had a problem with drugs or with police. At the urging of Feliciano's counsel, the court permitted some of the venire persons to come to the bench to discuss questions they might feel uncomfortable discussing in open court, relating to such matters as personal or family members' involvement with crime or drugs. However, citing security concerns expressed by the marshals, the court denied Feliciano's counsel's request that the defendants be allowed to come to the bench to hear these responses. The district court did, however, permit defense counsel, who participated in the bench inquiries, to interrupt the bench questioning at any time in order to consult with the defendants, should they desire to do so, and to return to the bench with any additional questions suggested through such consultation.

When the time came to pick the jury for the civil rights case, venire persons were asked, among other things, whether they would give less consideration to a prison inmate, and whether they had ever made a complaint about law enforcement. When attention turned to selection of jurors for the case at hand, the

venire persons were asked, among other things, about: whether they knew the witnesses or other individuals involved in the case; whether they had any experiences with law enforcement agents; their understanding of the presumption of innocence; their feelings about the Government's possible presentation of evidence of tape-recorded conversations; their feelings about the Government's use of informants; whether they could fairly judge evidence relating to a homicide; their attitudes toward Hispanics; whether they could fairly judge evidence that might show that the defendants were members of a gang or were involved in narcotics activity; whether they had heard of Los Solidos or of the Latin Kings, a rival gang, and, if so, whether what they heard would influence their judgment in the case at hand.

With respect to the question whether they had heard about Los Solidos, venire members who wished to do so were permitted -- again at the urging of Feliciano's counsel -- to approach the bench and were questioned as before outside the hearing of the defendants but in the presence of defense counsel, about what they knew or had heard about Los Solidos. The district court again told defense counsel that they could interrupt the bench colloquy to consult with the defendants about matters revealed at the bench and to put further questions to the venire persons that might arise from such consultation. Two persons who eventually served on the jury were among those who came to the bench and were questioned by the court and by counsel about what they had read or heard relating to Los Solidos, and whether any such reports would influence their judgment in this case.

Only one other person who served on the jury approached the bench, and that for the purpose of discussing whether a medical appointment he had might interfere with service on the jury. According to the district court, "[the] defendants observed the process [at the bench] from no more than 15 feet away." At no time did any defense counsel take advantage of the court's permission to interrupt the bench colloquy to consult with his client about information provided by potential jurors at the sidebar.

At the conclusion of all questioning, the peremptory strikes were made in open court, with the defendants able to observe the process and to consult with counsel as to any matters revealed in open court or at the bench. Although armed with the information provided through open court voir dire and with the opportunity to consult with the defendants concerning any bench colloquy, apart from the objection to the method of questioning, none of the defense counsel expressed dissatisfaction with the composition of the jury selected for service.

With respect to the murder of Edwin Ramos, the Government's evidence at trial was essentially as follows. Members of Los Solidos were upset that Ramos, a member of Los Solidos and a former member of the Latin Kings, had sold a gun - possibly to a member of the rival Latin Kings - that had been given to him by Nelson Gonzalez, the president of Los Solidos' Meriden chapter. Gonzalez told Ronald Pagan, the "warlord" of the Meriden chapter, that Ramos should be "terminated," which Solido members Alex Rivera and Keith

Streeter understood to mean that Ramos was to be killed. Gonzalez entrusted Pagan and Ruben Feliciano, a probationary member of Los Solidos, with the task of "terminating" Ramos.

According to the evidence adduced by the Government, on the evening of March 24, 1997, Pagan and Feliciano drove to the apartment of Naomi Rivera in Meriden, where they picked up Edwin Ramos and drove with him to the home of Alex Rivera. After stopping at a store, Pagan, Feliciano, Alex Rivera, and Ramos then drove to a cemetery in Meriden, where all four exited the car. Feliciano asked Ramos what had happened to the gun that Gonzalez had given him. Upon being asked this question a second time, Ramos said that he might have lost the gun. Feliciano laughed and then shot Ramos once in the head, killing him.

Apart from the evidence relating to the murder of Edwin Ramos, the Government also introduced evidence concerning the organizational structure of Los Solidos and the drug trafficking activities of its members. This evidence was provided primarily through the testimony of two investigating agents -- FBI Special Agent Jeff Rovelli and Sergeant Ronald Bair of the Hartford Police Department -- and through former members of Los Solidos.

Special Agent Rovelli testified that, from the beginning of 1994 up to the time of trial, he participated in a joint task force ("Task Force"), composed of federal, state, and local law enforcement officers, investigating violent gang activity in Hartford, Connecticut, with attention focused particularly on

Los Solidos. Rovelli eventually became the coordinator of the Task Force's activities. He took part, inter alia, in the execution of federal and state search warrants at Solido locations, pursuant to which narcotics, firearms, and copies of Los Solidos' by-laws were seized. He also participated in court-authorized interceptions of phone communications among Solido members and reviewed the results of other electronic surveillance of gang communications. On the basis of this extensive experience with Los Solidos, Rovelli was permitted by the district court to testify as an expert as to the structure, leadership, practices, terminology, and operations of Los Solidos. Rovelli also testified as a fact witness about, for example, the Task Force's execution of search warrants at the residences of Solido members at Natalie Street in Hartford and at Blue Hills Avenue in Bloomfield, Connecticut, where copies of Los Solidos' by-laws and other Solido documents were seized. He further testified that he orchestrated controlled and undercover narcotics purchases from members of Los Solidos and conducted surveillance as those purchases occurred, including purchases close to the time of the Ramos murder. Rovelli also testified that he participated in the seizure of narcotics and narcotics paraphernalia from Los Solidos locations.

Sergeant Bair was not offered by the Government as an expert witness. He testified that on April 18, 1997, while working as a detective in the narcotics division of the Hartford Police Department, he personally observed a confidential informant, acting under his direction and control, making an undercover purchase of crack cocaine at the residence of Solido member

Michael Martin at 76 Hamilton Street in Hartford, on the basis of which he was able to obtain a search warrant for that location that resulted, inter alia, in the seizure of heroin and a copy of the by-laws of Los Solidos.

Keith Streeter, one of the former members of the Meriden chapter of Los Solidos whom the Government called to the witness stand, testified that he joined Los Solidos, in part, in order to make money selling narcotics. Streeter confirmed the testimony of Special Agent Rovelli that Solido members were required to pay ten percent of their earnings, including proceeds from drug sales, into the chapter "kitty" -- maintained by the chapter "Treasurer" -- as dues. Streeter further testified that he personally participated with other members of Los Solidos in selling cocaine, and that Solido members sold drugs throughout the city of Meriden, including areas "controlled" by Los Solidos.

On February 2, 1999, presentation of evidence was completed. On February 8, 1999, the jury returned its verdicts, finding all defendants guilty on all counts charged.

On April 29, 1999, Feliciano and Pagan were sentenced principally to life imprisonment on Count Two (the substantive VCAR count), to run concurrently with a sentence of ten years' imprisonment on Count One (the VCAR conspiracy count) and consecutively to a sentence of sixty months' imprisonment on Count Three. On May 25, 1999, Gonzalez was sentenced principally to life imprisonment on Count Two, to run

concurrently with a sentence of ten years' imprisonment on Count One.

DISCUSSION

A. *Jury Selection*

The district court, in accordance with a request from Feliciano's counsel, occasionally interrupted the questioning of venire members in open court in order to bring some venire members to the bench to be questioned on certain limited issues. Feliciano argues, however, that conducting this questioning, over counsel's objection, outside the hearing of the defendants violated his constitutional rights under the Fifth and Sixth Amendments and his right to be present under Rule 43(a) of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 43(a) ("The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."). Feliciano contends that this defect in the conduct of voir dire was of structural dimension, its potentially prejudicial effects being of such magnitude as to require vacatur of his convictions and remand for retrial.

"The process of empaneling a jury is firmly entrusted to the sound discretion of the trial judge and will not be disturbed absent an abuse of this discretion." *United States v. Morales*, 185 F.3d 74, 84 (2d Cir. 1999) (internal quotation marks

omitted); cert. denied, 146 L. Ed. 2d 229, 120 S.Ct. 1282 (2000).

"There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California*, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 87 S.Ct. 824 (1967). n2 The Supreme Court has distinguished two kinds of errors that can occur at, or in relation to, a criminal proceeding: so-called "trial errors," which are of relatively limited scope and which are subject to harmless error review, and "structural defects," which require reversal of an appealed conviction because they "affect[ ] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 113 L. Ed. 2d 302, 111 S.Ct. 1246 (1991). "Errors are properly categorized as structural only if they so fundamentally undermine the fairness or the validity of the trial that they require voiding its result regardless of identifiable prejudice." *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996).

n2 Because Feliciano claims that both his constitutional rights and his rights under Rule 43(a) were violated at voir dire, we apply caselaw on the constitutional right to presence and harmless constitutional error, and also consider cases involving challenges based on Rule 43(a) alone, which are subject to harmless error review under Rule 52(a) of the Federal Rules of Criminal Procedure.

1. If the district court erred in conducting a portion of voir dire outside the hearing of defendants, was that error structural?

"To determine whether an error is properly categorized as structural, we must look not only at the right violated, but also at the particular nature, context, and significance of the violation." *Yarborough*, 101 F.3d at 897.

We note first that defendants have cited no case -- and we have found none -- in which an appellate court has found a structural defect where a defendant was present throughout but unable to hear a circumscribed portion of voir dire, and whose counsel was allowed to consult with him about the limited questioning outside his hearing. The Supreme Court has "found structural errors only in a very limited class of cases," *Johnson v. United States*, 520 U.S. 461, 468, 137 L. Ed. 2d 718, 117 S.Ct. 1544 (1997). Situations in which courts have found structural error involve violations of a defendant's rights far more serious than any claimed here. *See, e.g., Fulminante*, 499 U.S. at 309-10 (noting that the total deprivation of the right to counsel at trial, a judge who was not impartial, unlawful exclusion of members of the defendant's race from a grand jury, and violations of the right to self-representation at trial and of the right to a public trial are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards"); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 124 L. Ed. 2d 182, 113 S.Ct. 2078 (1993) (holding that erroneous reasonable-doubt instruction is structural error); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir. 1998) (holding that exclusion of jurors from petit jury on the basis of

race is structural error). Further, the Supreme Court has not held that a trial court's exclusion of a defendant from a portion of a criminal proceeding is ipso facto a structural defect. *See Rushen v. Spain*, 464 U.S. 114, 120-21, 78 L. Ed. 2d 267, 104 S.Ct. 453 (1983) (applying harmless error review to trial judge's conversations with juror in defendant's absence concerning evidence at trial of which the juror had prior knowledge); *see also United States v. Gagnon*, 470 U.S. 522, 526, 84 L.Ed. 2d 486, 105 S.Ct. 1482 (1985) ("'The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 78 L.Ed. 674, 54 S.Ct. 330 (1934) (modification in original))).

Our Court has stated that

> Fulminante and Rushen require us to consider the nature of a "presence error" in the context of the specific proceeding from which the defendant was excluded. In the usual case, such an error will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal.

Yarborough, 101 F.3d at 898 (quoting *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995)).

We express no judgment as to whether the district court's security concerns rendered its decision to exclude the defendants from the limited bench questioning free from error because we conclude that even assuming there was error, it is clear that any error here did not "affect[ ] the framework within which the trial proceeded." *Fulminante*, 499 U.S. at 310. Feliciano and his co-defendants were present in the courtroom for the entire jury selection process, with most of the questions answered by the jurors in open court. Defendants were provided by the district court with the unlimited opportunity to consult with their counsel at any time during the limited bench questioning about what was revealed at sidebar and to propose questions to the venire persons who came to the bench. In addition, all three defendants were present and able to consult with counsel when the peremptory challenge process was conducted in open court. Accordingly, we find that any error here was not of such dimension as to undermine the integrity of the trial and require automatic reversal.

2. If the district court erred in conducting a portion of voir dire outside the hearing of defendants, was that error harmless?

Apart from the reasons stated above, we find the following additional reasons for concluding that any error in the process of selecting the jury, assuming arguendo there was such, was harmless beyond a reasonable doubt. Along with the district court's probing inquiry, counsel for the defendants participated vigorously in questioning the venire persons who came to the bench. Only two venire members who came to the bench to discuss a potentially substantive matter (their exposure to media

reports concerning Los Solidos) were selected to serve on the jury, and their selection was not opposed by any defense counsel. When, after questioning the jurors in open court and (in a few instances) at the bench, the peremptory challenges were made, the defendants were able to discuss with counsel any matters revealed during the bench questioning. *See, e.g., United States v. Washington*, 227 U.S. App. D.C. 184, 705 F.2d 489, 498 (D.C. Cir. 1983) (per curiam) (finding that it was harmless error beyond a reasonable doubt for the district court to permit potential jurors, seven of whom served on the jury, to be questioned about their prior involvement in the criminal justice system at the bench in the presence of appellant's counsel but out of the direct observation and hearing of the appellant because only a very limited portion of voir dire was conducted at the bench, in which appellant's counsel participated and had sufficient time to confer with appellant concerning the jurors' responses); cf. *United States v. Dioguardi*, 428 F.2d 1033, 1039-40 (2d Cir. 1970) (Friendly, J.) (noting that the district court was potentially subject to criticism for examining at sidebar prospective jurors who had read or heard anything about any of the defendants, but excusing this procedure because defendants were seated 15-20 feet away from the bench, and their counsel, who had been advised earlier of this procedure, participated in the sidebar questioning and had ample time to consult with the defendants).

We therefore conclude that any error of the district court in conducting the limited portion of voir dire at issue in this case was harmless beyond a reasonable doubt. n3

n3 Because of this finding, we need not decide whether Pagan and Gonzalez waived the right to challenge the district court's conduct of jury selection by not objecting to this procedure below.

B. *The Sufficiency of the Evidence that Los Solidos Engaged in Racketeering Activity and Feliciano's Proposed Instruction on this Element*

(1) *Sufficiency of the Evidence that Los Solidos Engaged in Racketeering Activities*

The VCAR establishes as an essential element of any offense charged under it that the "enterprise" in relation to which the charged crimes were allegedly committed was "an enterprise engaged in racketeering activity." 18 U.S.C. § 1959 (a). The VCAR, at Section 1959(b)(1), expressly adopts the definition of "racketeering activity" set forth in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, which provides, in pertinent part, that

> (1) "racketeering activity" means . . . (D) any offense involving . . . a controlled substance . . . punishable under any law of the United States.

18 U.S.C. § 1961(1)(D).

The Superseding Indictment alleged that the "Enterprise [i.e., Los Solidos], through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code,

Sections 1959(b)(1) and 1961(1), namely, acts involving trafficking in controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and acts involving murder, in violation of Connecticut General Statutes, Sections 53a-54a." Thus, in the instant case the Government was required to prove as an essential element of the charged VCAR offenses that Los Solidos, through its members and associates, engaged in trafficking in controlled substances that would constitute substantive narcotics offenses in violation of 21 U.S.C. § 841, or narcotics conspiracy in violation of 21 U.S.C. § 846, or acts involving murder in violation of Connecticut law. The Government argues that it adduced abundant evidence of drug trafficking offenses by members of Los Solidos that sufficed to prove that Los Solidos was engaged in racketeering activity.

With respect to the racketeering element, the district court instructed the jury as follows:

> The second element that the government must prove beyond a reasonable doubt is that Los Solidos engaged in racketeering activities, in this case trafficking in controlled substances and acts involving murder.

Feliciano contends on appeal that his conviction on the VCAR counts should be reversed because the evidence at trial that Los Solidos was engaged in racketeering activities was insufficient. Specifically, he argues that the Government produced at best "generalized" evidence of narcotics trafficking

ranging over a period of years, without providing the jury with evidence of particularized, spatio-temporally defined acts of narcotics trafficking as the Government would be required to do when prosecuting a defendant for particular narcotics offenses under 21 U.S.C. §§ 841 and/or 846.

A defendant challenging a conviction based upon a claim of insufficiency of the evidence bears a heavy burden. *See United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000).

> We consider the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. We will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Nevertheless, a conviction cannot stand when the Government has not introduced sufficient evidence to sustain each essential element of the crime charged beyond a reasonable doubt.

Id. (citations and internal quotation marks omitted).

Our review of the trial transcript -- viewing the evidence, as we must, in the light most favorable to the Government -- convinces us that the Government adduced evidence sufficient to persuade any rational juror, drawing inferences from the

evidence in favor of the Government, that over a period of several years, Los Solidos, through its members and associates, trafficked in narcotics. Rovelli and Bair testified that they participated in undercover purchases of crack cocaine, powder cocaine, and heroin from members of Los Solidos. On September 20, 1994 and April 18, 1997, task force participants, pursuant to search warrants executed at the residences of Los Solidos members on Natalie Street and Hamilton Street in Hartford, seized drugs, drug paraphernalia, and materials describing the by-laws and activities of Los Solidos. Former Solido member Keith Streeter testified that gang members sold drugs throughout the city of Meriden and that gang members were required to pay a portion of their earnings, including earnings from drug sales, into the chapter's "kitty," maintained by the chapter's "Treasurer." The money thus collected was used to purchase firearms for protection, and a stash of such weapons was held under the control of the gang's "warlord." Los Solidos chapter "Presidents" had authority to order violent "missions," including murder, against non-members and to terminate members found to be in violation of the gang's rules. Accordingly, we find that at trial the Government adduced abundant evidence of drug trafficking by members of Los Solidos in violation of 21 U.S.C. §§ 841(a)(1), and that such evidence was more than sufficient to show that Los Solidos engaged in racketeering activities. *See United States v. Gray*, 137 F.3d 765, 773 (4th Cir.), *cert. denied*, 525 U.S. 866, 142 L.Ed. 2d 129, 119 S.Ct. 157 (1998) ("The evidence that the enterprise dealt in drugs would . . . be sufficient to support a jury finding that the enterprise engaged in racketeering.").

In a footnote to his brief, Feliciano implicitly suggests a further claim not raised below: that the district court erred by not instructing the jury as to the elements of substantive narcotics offenses under 21 U.S.C. § 841 and the elements of narcotics conspiracy under 21 U.S.C. § 846. In his proposed instruction on the racketeering activity element, however, Feliciano requested the court to instruct the jury as follows:

> In this case, you must find beyond a reasonable doubt that Los Solidos was an enterprise that engaged in racketeering activity, in this case trafficking in controlled substances in violation of 21 USC Section 841(a)(1) and 846 and acts involving murder in violation of Conn. Gen. Stat. Sections 53a-54a. In this regard, I must instruct you that it is not sufficient that you conclude that some members of Los Solidos may have engaged in these activities, you must find beyond a reasonable doubt that the Enterprise so acted in order to find either of the defendants guilty in this case.

The first sentence of this instruction employs the same generic reference to "trafficking in controlled substances" that the district court employed in the instruction that Feliciano now, on appeal, suggests was defective. Moreover, while Feliciano's proposed instruction refers to 21 U.S.C. §§ 841 (a)(1) and 846, it does not request the district court to instruct the jury as to the elements of these offenses. Because Feliciano did not argue or cite any authority in his brief that instruction on these elements

was required but only suggested that this omission made the jury's task of finding that Los Solidos engaged in racketeering activities more difficult, there are serious questions as to whether this specific claim is properly before us. In any event, it is clear that Feliciano's counsel, who demonstrated competence and vigorous advocacy throughout jury selection and trial, as well as on appeal, did not object below to the district court's failure to instruct the jury on the elements of Los Solidos' alleged racketeering offenses. Therefore, examination of this matter is subject to "plain error" analysis under Rule 52(b) of the Federal Rules of Criminal Procedure, guided by the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725, 731-37, 123 L.Ed. 2d 508, 113 S.Ct. 1770 (1993). See United States v. Miller, 116 F.3d 641, 672 (2d Cir. 1997) ("If there was no objection to the erroneous instruction, the instruction is reviewable on appeal only for 'plain error' . . . .").

Our court "has restated the first three prongs of the Olano test as follows:"

> First, there must be "error," or deviation from a legal rule which has not been waived. Second, the error must be "plain," which at a minimum means "clear under current law." Third, the plain error must, as the text of Rule 52(b) indicates, "affect[ ] substantial rights," which normally requires a showing of prejudice.

United States v. Bayless, 201 F.3d 116, 127-28 (2d Cir.) (quoting *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994))

cert. denied, 120 S.Ct. 1571 (2000). "A plain error is an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Gore*, 154 F.3d 34, 43 (2d Cir. 1998) (internal quotation marks omitted). On appeal, Feliciano has the burden of persuasion to show that the district court committed plain error. *See id.* at 42.

Application of plain error analysis to this matter encounters the difficulty that Feliciano did not argue in his appellate brief or at oral argument that the first three prongs of the Olano test were satisfied here. Counsel for Pagan referred to the district court's omission to instruct on the elements of §§ 841(a)(1) and 846 -- also for the first time on appeal -- in conjunction with one of his constitutional arguments (see below, Section G), n4 but did not argue in his appellate brief that Olano was satisfied as to the jury instruction issue (or any other issue). This posture of the case presents obvious difficulties to an appellate court's analysis of the first three prongs of the Olano test. *See, e.g., Olano*, 507 U.S. at 734 (Under Rule 52(b), "it is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.").

n4 Pagan referred to the district court's omission to instruct on the elements of §§ 841(a)(1) and 846 in attempting to support his argument that "the district court . . . failed to require any proof of the necessary temporal, relational, and/or quantitative relationships required by various elements of the [VCAR]."

Given our review of the evidence discussed above, however, we find that such analysis is unnecessary in the circumstances of this case. Even if the district court did commit plain error by omitting to instruct on the elements of §§ 841(a)(1) and 846 -- and an argument for that conclusion may have some force -- and even if Feliciano could show that this error "affected [his] substantial rights," there was abundant evidence at trial that Los Solidos engaged in racketeering activities by trafficking in controlled substances (including heroin, cocaine, and crack cocaine) in violation of these statutes. Thus, in our judgment, because the district court's omission did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, the fourth prong of Olano is not satisfied here. Cf. Johnson, 520 U.S. at 469 ("We need not decide [whether Olano's "substantial rights" prong was satisfied] because, even assuming that the failure to submit materiality to the jury 'affected substantial rights,' it does not meet the final requirement of Olano [because of the abundant evidence of materiality].").

(2) *Feliciano's Proposed Instruction on Los Solidos' Racketeering Activities*

Apart from his contention concerning the sufficiency of proof of Los Solidos' racketeering offenses, Feliciano claims that the district court erred by not providing his proposed instruction because the jury needed to be instructed as to what acts in evidence at trial could constitute racketeering activities of the enterprise. A defendant attempting to show that a district court

erred in rejecting a proposed jury charge carries a heavy burden. The defendant must show that his proposed charge "accurately represented the law in every respect, and that the charge actually given, viewed as a whole, prejudiced him." *United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996) (internal quotation marks omitted).

The purported purpose of Feliciano's suggested instruction that "it is not sufficient that you conclude that some members of Los Solidos may have engaged in [racketeering] activities" was to inform the jury that if, for example, individuals who happened to be members of Los Solidos obtained drugs on their own and sold them entirely for their own personal profit, such activity could not count as racketeering activity of Los Solidos. The first problem with this formulation, however, is that that explanation is not at all clear from what the proposed instruction states. Feliciano's proposed instruction distinguishes the activities of members of Los Solidos and of "the Enterprise," not the activities of members of Los Solidos as members and otherwise.

Another problem is that the proposed instruction might have caused the jury to disregard evidence that could legitimately support a finding that the members of Los Solidos as members engaged in drug trafficking. Among other evidence, the jury heard testimony from Solido members who stated that they joined the gang, in part, to take advantage of the gang's drug connections in order to make money selling drugs themselves. There was further testimony that Los Solidos required its members to pay ten percent of the proceeds from their drug

sales and other earnings as dues into the gang's "kitty" maintained by the gang's "Treasurer." The jury might have gotten the misimpression from the proposed instruction that such drug sales by "members of Los Solidos" must be categorically disregarded in determining whether "the Enterprise" engaged in racketeering activity.

In addition, the suggested instruction that "you must find beyond a reasonable doubt that the Enterprise [and not the members] so acted" could puzzle the jury as to how the enterprise could act other than through its members. The VCAR provides the following explication of "enterprise:"

> "Enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . .

18 U.S.C. § 1959(b)(2). Especially where a substantial portion of the activities of a "union or group of individuals associated in fact although not a legal entity" are conducted in violation of law, n5 the necessity that informal groups can only act through their individual members (who do not have legally recognized agency status) is particularly apparent. *See United States v. Cutolo*, 861 F. Supp. 1142, 1146 (E.D.N.Y. 1994) ("An enterprise, here a group of individuals associated in fact, can only act through its members, associates, or employees."). Where individuals are associated only "in fact," determining whether the subject enterprise engaged in racketeering activity requires fact-based attention to the ways in which, for example,

the individuals acted for the group and/or in concert with other members, or acted in ways that contributed to the purposes of the group, or that were facilitated or made possible by the group. n6

n5 No defendant in this case has denied the possibility that a street gang can come within the VCAR's concept of an enterprise or that the foundation of this possibility is the VCAR's reference to "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1959(b)(2).

n6 In this regard, we note that with respect to the interstate commerce element, the district court instructed the jury that activities that would satisfy this element were "activities in furtherance of the enterprise" that affected interstate or foreign commerce. Tr. 2/3/99 at 160 (emphasis added).

However, rather than focus the jury's attention on the ways in which the members of Los Solidos acted for, or with the aid of, the gang, Feliciano's proposed instruction would turn the jury's attention away from the activities of the members of Los Solidos and toward the actions of "the Enterprise," despite the fact that the statute requires attention to the actions of "individuals associated in fact." n7 18 U.S.C. § 1959(b)(2) (emphasis added). We therefore find that Feliciano's proposed instruction would be confusing to the jury and does not "accurately represent[ ] the law." *Thompson*, 76 F.3d at 454; *see also United States v. Bahna*, 68 F.3d 19, 21 (2d Cir. 1995) ("[A] failure to grant a request for instructions that are in any

respect incorrect and unsound does not constitute error.") (quoting *Clark v. Pennsylvania R.R.*, 328 F.2d 591, 595 (2d Cir. 1964)).

n7 Although the district court's instruction on this element did not mention the members of Los Solidos, it did not turn the jury's attention away from the actions of the members in the way that Feliciano's proposed instruction would.

For these reasons, we reject Feliciano's claim that the district court erred in not adopting his proposed charge on Los Solidos' racketeering activities.

C. *The District Court's Instructions on the VCAR's Interstate/Foreign Commerce Element*

With respect to the interstate/foreign commerce element of the VCAR, the district court instructed the jury as follows:

> The third element that you must find beyond a reasonable doubt is that the enterprise itself, namely the Los Solidos, or the racketeering activities of those associated with it, had some effect upon interstate or foreign commerce. This effect on interstate or foreign commerce could have occurred in any way, and it need only have been minimal. It is not necessary that you find that a substantial affect [sic] on interstate or foreign commerce occurred . . . So long as activities in furtherance of the enterprise

> affected interstate or foreign commerce in some minimal way, you may find that this element has been satisfied. It is sufficient, for example, that in the course of the racketeering activities, members of the enterprise sold narcotics.

Gonzalez, "like many criminal defendants in [recent] years," *see United States v. Goodwin*, 141 F.3d 394, 397 (2d Cir. 1997), invokes the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 131 L.Ed. 2d 626, 115 S.Ct. 1624 (1995), to challenge his federal criminal conviction. Specifically, he argues that the district court erred when it instructed the jury that the "effect on interstate or foreign commerce [of the activities of Los Solidos] . . . need only have been minimal," and that "it is not necessary that [the jury] find that a substantial affect [sic] on interstate or foreign commerce occurred." Gonzalez contends that, in light of *Lopez*, the jury should have been instructed that it had to find the activities of Los Solidos had a substantial -- not merely a minimal -- effect on interstate or foreign commerce. We find Gonzalez's argument to be without merit.

In *Lopez*, the Supreme Court reaffirmed that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce .

. . ." 514 U.S. at 558-59 (citing cases); *see also Goodwin*, 141 F.3d at 398. However,

> [i]n *Lopez*, the Supreme Court held that Congress exceeded its authority under the Commerce Clause in enacting the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q), which made it a federal offense "'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Lopez*, 514 U.S. at 551, 115 S.Ct. 1626 (quoting 18 U.S.C. § 922(q)(1)(A)). The Court reached this conclusion because the Gun Free School Zones Act "neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551, 115 S.Ct. at 1626 (emphasis added).

Goodwin, 141 F.3d at 398. The Supreme Court also noted that Congress had not made any finding that the activities the Act prohibited had an effect on interstate commerce. *Lopez*, 514 U.S. at 562.

The basis on which federal prosecution of Gonzalez and his co-defendants was grounded was their commission of a violent crime undertaken for the sake of their membership in a gang that -- as the evidence at trial demonstrated -- engaged over several years in selling cocaine, crack cocaine, and heroin. In

the aftermath of the *Lopez* decision, this Court has repeatedly held that Congress reasonably concluded that narcotics trafficking has a substantial effect on interstate or foreign commerce. *See, e.g., United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997) (upholding the district court's instruction that defendants' drug trafficking activities prosecuted under RICO need only be "minimal" and "need not be substantial," and stating that "*Lopez* did not alter the principle that where the type of activity at issue has been found by Congress to have a substantial connection with interstate commerce, the government need only prove that the individual subject transaction has a de minimis effect on interstate commerce"); *Goodwin*, 141 F.3d at 399 ("Drug trafficking activity clearly is a proper subject for federal regulation . . . ."); *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) (noting that "Congress has made specific findings that local narcotics activity has a substantial effect on interstate commerce"); *Proyect v. United States*, 101 F.3d 11, 12-14 (2d Cir. 1996) (per curiam) (noting the same point and quoting *Genao*). Our Court has also held that *Lopez* did not heighten the minimal interstate commerce effect requirement for prosecution of Hobbes Act, RICO narcotics trafficking, and money laundering offenses, all of which are economic activities that in the aggregate have a substantial effect on interstate commerce. *See Miller*, 116 F.3d at 674 (RICO narcotics trafficking); *United States v. Fairish*, 122 F.3d 146, 148 (2d Cir. 1997) (Hobbs Act); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997) and *Goodwin*, 141 F.3d at 399-400 (money laundering); *see also Gray*, 137 F.3d at 773 ("Although [the Government's] evidence of the enterprise's connection with interstate

commerce is not copious, we are satisfied that it is enough to meet the minimal standard required to satisfy the interstate commerce requirement of [the VCAR].").

Moreover, the VCAR has a jurisdictional element requiring the Government in each prosecution to provide evidence of an effect on interstate or foreign commerce. *See United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997) ("The substantial effect requirement [of *Lopez*] is satisfied when criminal statutes contain a jurisdictional element . . . Section 1959 satisfies the substantial effect requirement [because it] incorporates a jurisdictional element requiring a nexus between the offense in question and interstate commerce."); *cf. Fairish*, 122 F.3d at 149 ("In sharp contrast to the statute at issue in *Lopez*, the Hobbs Act does contain . . . a jurisdictional element."); *Goodwin*, 141 F.3d at 400 ("The inclusion of . . . jurisdictional elements precludes any serious challenge to the constitutionality of the money laundering statute . . . because [if proven] it guarantees a legitimate nexus with interstate commerce." (internal quotation marks omitted)).

Gonzalez argues that the Supreme Court's recent opinion in *United States v. Morrison* , 529 U.S. 598, 146 L.Ed. 2d 658, 120 S.Ct. 1740 (2000), demonstrates -- at the very least -- that the district court's instruction was erroneous because the Court in *Morrison* stated that Congress lacks authority under the Commerce Clause to regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. *See id.* at 1754. At issue in *Morrison* was Section 13981 of the Violent Crime Control and Law

Enforcement Act of 1994, § 40302, 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence. Implicit in Gonzalez's contention is the claim that the VCAR, like Section 13981, is also directed only to noneconomic criminal activity.

Gonzalez's reliance on *Morrison* is misplaced. In *Morrison*, the Supreme Court rejected the argument that Section 13981 regulates activity that substantially affects interstate commerce. In doing so, the Court noted that "like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Id.* at 1751. In addition, the Court rejected petitioners' attempt to link the regulated activity to an effect on interstate commerce, finding the purported link to be based on an attenuated, but-for causal chain of reasoning. *See id.* at 1752-53.

In contrast to Section 13981, the VCAR, as noted, includes a jurisdictional element and covers only violent crimes linked to the perpetrator's position in an enterprise engaged in racketeering activity that must satisfy the jurisdictional element. As the statute thus makes plain, Congress was not attempting to assert jurisdiction over noneconomic crimes that are constitutionally within the exclusive jurisdiction of state and local government. Rather, as the legislative history indicates, "it is evident that Congress enacted section 1959 in view of the 'Federal Government's strong interest . . . in suppressing the activities of organized criminal enterprises.'" *United States v. Mapp*, 170 F.3d 328, 336 (2d Cir.) (affirming a murder

conviction under § 1959 and quoting S. REP. No. 98-225, at 305 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484), *cert. denied*, 120 S.Ct. 239 (1999). "[Because] any predicate murder [under § 1959 must] bear a strong relationship to racketeering activity that affects interstate commerce, it does not risk improperly making purely local crimes a matter of federal concern." *Id.*

Moreover, the racketeering activity that satisfies the jurisdictional element in this case -- narcotics trafficking -- is clearly economic in nature and has been found by Congress to have a substantial effect on interstate commerce. *See, e.g., Genao*, 79 F.3d at 1337 (noting Congress' finding that even local narcotics trafficking has "a substantial effect on interstate commerce"); *Goodwin*, 141 F.3d at 399 ("We have repeatedly held that the 'Controlled Substances Act concerns an obviously economic activity' substantially affecting interstate commerce, namely, narcotics trafficking, and have sustained the Act against criminal defendants' *Lopez* challenges.") (quoting *Genao*, 79 F.3d at 1337, and citing other cases).

Accordingly, we find that the district court did not err in instructing the jury that it need only find that the activities of Los Solidos -- the proof of which at trial related to narcotics trafficking -- need only have been minimal.

Gonzalez also contends that the district court erred when, in its charge to the jury on the interstate commerce element, it stated that for satisfaction of this element, "it is sufficient, for example, that in the course of the racketeering activities,

members of the enterprise sold narcotics." Gonzalez asserts that, in this instruction, the district court implicitly stated that it was true that there were such sales, thus, in effect, improperly directing a verdict on this element. We disagree.

In reviewing a district court's jury instruction, we view a disputed charge within the context of the district court's charges in their entirety. *See United States v. Caban*, 173 F.3d 89, 94 (2d Cir.), *cert. denied*, 120 S.Ct. 174 (1999).

The district court instructed the jury that the Government bore the burden of proving beyond a reasonable doubt the existence of each element of each charge as to each defendant. At no point in its instructions did the district court tell the jury that the Government had proven any element of any charge as to any defendant beyond a reasonable doubt or direct the jury that it must find in favor of the Government as to any element of any charge against any defendant. With respect to the element at issue here, the district court instructed the jury that the Government "must prove beyond a reasonable doubt . . . as to each defendant: . . . (2) that Los Solidos engaged in racketeering activity; [and] (3) that such racketeering activity, if found, affected interstate or foreign commerce; . . ."

At trial, witnesses for the Government testified that members of Los Solidos sold drugs and that the drugs bought and sold by Los Solidos moved in interstate or foreign commerce. n8 Viewing the challenged instruction, as we must, in conjunction with the district court's instructions as to what the Government was required to prove, and considering the nature of the

Government's efforts at trial to satisfy these requirements, it is clear that the district court did not, as Gonzalez contends, instruct the jury that the Government had, in fact, proven beyond a reasonable doubt "that in the course of the racketeering activities, members of the enterprise sold narcotics." Rather, the district court instructed the jury that if it credited beyond a reasonable doubt the evidence adduced by the Government, so long as those activities in furtherance of the enterprise affected interstate of foreign commerce in some minimal way (as the Government attempted to show), that finding by the jury would discharge the Government's obligation on the interstate/foreign commerce element of the VCAR counts. For the reasons stated above, that instruction is in accord with the law.

n8 At trial, Special Agent Rovelli testified that heroin and cocaine are not manufactured in Connecticut, and former Solido member Keith Streeter testified that Los Solidos obtained in New York some of the drugs they sold in Connecticut.

D. *The Testimony of Rovelli and Bair*

"As a general proposition, the decision of whether to admit expert testimony is left to the discretion of the trial judge and should not be set aside unless manifestly erroneous." *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (internal quotation marks omitted). Rule 702 of the Federal Rules of Evidence allows broad discretion to a district court to admit expert testimony "in the form of an opinion or otherwise" when,

in the district court's judgment, it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

In the course of his direct testimony, Special Agent Rovelli responded affirmatively to the following question from the prosecutor:

> And based on your participation in the investigation as an organization have the Los Solidos been involved in narcotics trafficking?

Feliciano argues that the district court manifestly erred by permitting Rovelli to affirm this conclusion. This was improper, according to Feliciano, because this statement and related statements by Rovelli went beyond the scope of expert testimony and were based, in part, on hearsay statements by informants and on other evidence not before the court. Feliciano also characterizes Rovelli's response as an "ultimate" conclusion that Los Solidos' Meriden chapter was an enterprise engaged in racketeering activity. Feliciano finds similar problems with the testimony of Sergeant Bair, who, although not offered by the Government as an expert witness, was permitted to testify that Los Solidos controlled certain areas of Hartford for narcotics trafficking.

"In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony [that] states a legal conclusion." *Duncan*, 42 F.3d at 101. Our review of the trial transcript shows that at no point did either Rovelli or Bair use

terms from the VCAR, such as "enterprise" or "racketeering activity," or respond to questions using those terms. No legal conclusions were stated by either witness. Moreover, Rule 704(a) of the Federal Rules of Evidence does not forbid all testimony concerning ultimate issues. *See* Fed. R. Evid. 704(a) ("Except as provided in subdivision (b) [concerning expert testimony on the mental state or condition of a defendant in a criminal case], testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); *United States v. Daly*, 842 F.2d 1380, 1387 (2d Cir. 1988). Testimony by Rovelli and Bair about narcotics trafficking by Los Solidos was not objectionable merely because of its pertinence to the issue of whether Los Solidos engaged in racketeering activity.

This Court has repeatedly held that expert testimony admissible under Rules 702 and 703 of the Federal Rules of Evidence can, under certain conditions, be based on hearsay and evidence not admitted at trial. *See, e.g., United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) ("Expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions. [The expert witness in this case] was entitled to rely upon hearsay as to such matters as the structure and operating rules of organized crime families . . . since there is little question that law enforcement agents routinely and reasonably rely upon such hearsay in the course of their duties." (citations omitted)); *Daly*, 842 F.2d at 1387 ("If experts in the field reasonably rely on hearsay in forming their opinions and drawing their inferences, the expert witness may properly testify

to his opinions and inferences based upon such hearsay.").

Rovelli testified both as an expert and as a fact witness. Such dual testimony is not objectionable in principle. *See United States v. Young*, 745 F.2d 733, 760 (2d Cir. 1984) ("It was not improper for the government to elicit . . . expert testimony from law enforcement officers who also testified as fact witnesses."). But our review of the trial transcript shows that the line between Rovelli's opinion and fact witness testimony is often hard to discern, and the "facts" testified to are often stated very broadly and generally. For example, Rovelli testified, without supplying specific dates and locations, that he participated in undercover purchases of crack cocaine, powder cocaine, and heroin from members of Los Solidos. However, all three defense counsel had the opportunity, which they seized, to explore on cross-examination the limitations of Rovelli's experience and his testimony, both as an expert and as a fact witness. In addition, the district court advised the jurors that they were free to give opinion testimony whatever weight they thought it deserved or to disregard it entirely, if they believed that the opinion of an expert witness was not sufficiently based on experience or if it was outweighed or contradicted by other evidence.

The content of Sergeant Bair's testimony was more confined by limits of time and place. As noted, Bair was not offered as an expert witness. He testified primarily about a particular undercover operation in which he participated on April 18, 1997, and about an ensuing search warrant, in the execution of which he also participated. Bair's testimony provided the jury

with particularized evidence that it could evaluate with respect to the issue of whether Los Solidos sold narcotics. The jury could also consider Bair's evidence - if persuasive - as possibly corroborating or lending credence to the testimony of Keith Streeter that Los Solidos sold drugs throughout the city of Meriden, and as possibly corroborating Rovelli's testimony about Los Solidos' drug sales in Hartford and other cities.

For the above reasons, we reject Feliciano's argument that the district court manifestly erred by admitting the challenged testimony of Rovelli and Bair.

E. *The Prosecutor's Closing Statements*

In their summations, defense counsel attacked the credibility of several Government witnesses, including Naomi Rivera and her boyfriend, Wilfredo Abrahante. In addition to calling one of the Government's witnesses a "liar" and a "perjurer," Feliciano's counsel said Naomi Rivera shed "the biggest set of crocodile tears" when she was on the stand. Pagan's counsel spoke of "the utter lack of trustworthiness of government evidence by the witnesses," explicitly including Naomi Rivera and Wilfredo Abrahante ("Abrahante"). Gonzalez's counsel told the jury that "the government's job is to convict these three men" and that "there's no doubt about it, that's their job, and if you don't think, inherent in that, they will do anything to convict people that they think are guilty, to what the law allows, you're denying the process." He also said that many of the

Government's witnesses were "liars" and warned the jury not to be "railroaded into this patchwork quilt of lies and cowardice."

In rebuttal closing argument, the prosecutor responded to these attacks:

> Why in the world would he [Abrahante] come in and lie, and it wasn't like he came in by choice. Again, we got a forthwith grand jury subpoena and made him come in, and he was hesitant to do so, according to Special Agent Reiner.
>
> He's got no motivation to lie, and he and Naomi [Rivera] tell stories that are consistent in some ways, and off in little details, but that's a sign of truth telling.
>
> Now if we had gotten them together and said, "Okay, let's get your story straight on all the exact details," that would be a suggestion they are not testifying about what they remember independently but what is being concocted, and that's not what was done here.

Feliciano argues that in the closing statements quoted above, the prosecutor vouched for the credibility of the Government's witnesses and testified about the Government's pre-trial relations with these witnesses.

Also in their summations, defense counsel pointed to what they considered to be the lack of forensic evidence connecting the defendants to the murder. Alex Rivera testified that Pagan and Feliciano used a Nissan Stanza on the night of the shooting. Abrahante testified that on the night of the shooting, Pagan picked up Ramos and Feliciano at Naomi Rivera's house and that Pagan was driving a Volkswagen Jetta. As the Government admits, nothing of forensic value was recovered from either car.

The prosecutor responded to the challenge concerning the lack of forensic evidence in her rebuttal summation:

> We did check the cars. We analyzed them for forensic evidence. They went over them very carefully, even though it was months after the fact and the likelihood of finding evidence was small. That was done so that if there was anything there that either pointed to these defendants or pointed elsewhere, we would know about it.

Feliciano contends that the prosecutor here improperly invoked the integrity of the United States Attorney's Office and, in effect, testified as to the forensic examination of the vehicles.

"A prosecutor's improper summation results in a denial of due process when the improper statements cause substantial prejudice to the defendant . . . . Determining the existence of substantial prejudice involves three factors: the severity of the

misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." *United States v. Modica* , 663 F.2d 1173, 1181 (2d Cir. 1981) (citations omitted). "Defendants who contend that a prosecutor's remarks warrant reversal face a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial." *United States v. Rahman*, 189 F.3d 88, 140 (2d Cir.) (internal quotation marks omitted), cert. denied, 528 U.S. 1094, 145 L.Ed. 2d 698, 120 S.Ct. 830 (1999). "A prosecutor may not properly vouch for the credibility of a witness. However, the government is allowed to respond to an argument that impugns its integrity or the integrity of its case . . . and when the defense counsel have attacked the prosecutor's credibility or the credibility of the government agents, the prosecutor is entitled to reply with rebutting language suitable to the occasion." *United States v. Thai*, 29 F.3d 785, 807 (2d Cir. 1994) (citations and internal quotation marks omitted).

Prior to the statements objected to and without objection, the prosecutor in her rebuttal referred to Naomi Rivera's testimony that she considered herself a friend of Feliciano and was the girlfriend of Feliciano's brother. The prosecutor also made reference to Abrahante's testimony, stating that Abrahante was "an associate of Feliciano [who] lives in that area [and who] knows these people." Also, in the portion of the Government's rebuttal challenged by Feliciano, the prosecutor's statement that Abrahante "was hesitant to [testify]" makes explicit reference to the testimony of Special Agent Reiner to that effect. Given the defense's statements challenging the credibility of the

Government's witnesses and the defense's accusation that the Government was willing to "do anything" to convict the defendants, we find that the Government's response was within permissible bounds to the extent that it referred the jury to evidence at trial concerning Naomi Rivera and Abrahante, on the basis of which the jury could judge whether either witness had a motivation to lie. *See Thai*, 29 F.3d at 807. We note further that FBI Special Agent Peter Lavelle's testimony that the two cars had been searched provided a basis for the prosecutor's statement that "they went over [the cars] very carefully, even though it was months after the fact and the likelihood of finding evidence was small."

While we thus conclude that much of the challenged portion of the Government's rebuttal summation was justified as a response to the defendants' vigorous challenges to the integrity of the Government's case and by reference to the testimony of the Government's witnesses, we feel compelled to note that the prosecutor strained permissible bounds in asserting that the Government did not coach Naomi Rivera and Abrahante to make their testimony consistent and in stating that "we checked the cars." These statements come perilously close to testimony on the prosecutor's part. Nevertheless, we find that any prejudice that might arguably have been caused by these remarks was sufficiently dispelled by the district court's prompt responses and by its final instructions to the jury. *See, e.g., Mapp*, 170 F.3d at 338 ("Any prejudice arguably caused by the prosecutor's remarks was substantially eliminated by a curative instruction promptly given by the trial judge.").

When Feliciano's counsel objected to the prosecutor's statements regarding the credibility of its witnesses, the district court stated that:

> it is the jurors' recollection of what the evidence was that controls, and if there is an inconsistency, it is their prerogative, as they've been told before and will be told again, to draw their own conclusions as to the evidence itself, and what the inferences are that are reasonable to be drawn.

When Feliciano's counsel objected to the prosecutor's statements about the forensic examination of the cars, the district court said:

> No, she's not testifying . . . . She's characterizing the evidence as she sees it. If she's correct, then [sic] the jury can react accordingly. If the jury does not credit her version of the evidence, they are free to draw their own conclusions as to the evidence . . . .

In addition, prior to the parties' summations and, again, prior to the jury's deliberations, the district court instructed the jury that counsel's arguments are not evidence and that, while the parties may suggest to the jury what the jury should conclude from the evidence, "it is your recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you."

Accordingly, we conclude that any prejudice arguably caused by the challenged portions of the prosecutor's rebuttal summation was sufficiently corrected by the district court.

F. *The Sentencing of Nelson Gonzalez*

With respect to punishment, the VCAR states, in pertinent part, that:

> (a) Whoever . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . any individual in violation of the laws of any State or the United States . . . shall be punished --
>
> (1) for murder, by death or life imprisonment, or a fine under this title, or both . . .

18 U.S.C. § 1959(a)(1) (emphasis added). The jury having found all three defendants guilty on Count Two (the substantive murder count under Section 1959(a)(1)), district court sentenced each of the defendants to life imprisonment. n9 At Gonzalez's sentencing, the court stated, with respect to Section 1959(a)(1), that "the law says what the law says, and the law says that I must impose a sentence of life imprisonment upon you." n10

n9 Based on their offense levels and criminal history categories, each defendant was also subject to life imprisonment under the Sentencing Guidelines.

n10 Gonzalez was also sentenced to ten years' imprisonment on the conspiracy count (Count One), to run concurrently with his sentence for Count Two.

Gonzalez argues that Section 1959(a)(1), by its plain language, provides the option that one convicted of VCAR murder may be punished by a fine only. He contends that the district court's statement that "I must impose a sentence of life imprisonment upon you" shows that the district court overlooked this option and mistakenly thought that Section 1959(a)(1) provided a term of life imprisonment as a mandatory minimum. He argues therefore that remand to the district court for resentencing is required. We reject this argument.

Whether the district court misunderstood its sentencing authority is reviewed de novo. *See United States v. Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995). At the sentencing of each defendant, the district court explicitly rejected the possibility of a fine on the ground that no defendant had assets from which a fine of a magnitude appropriate to the offense could be paid. There was, therefore, no realistic possibility of a fine as a satisfactory possibility for punishing the defendants for the brutal, execution-style murder of a 16-year old boy. Given this finding, it was reasonable for the district court to conclude that it had no realistic choice but to sentence the defendants to life

imprisonment. Accordingly, we reject Gonzalez's claim that remand for resentencing is required in this case.

G. *Constitutional Challenges*

On appeal, Pagan raises several constitutional challenges that were not raised below. He argues that the VCAR is unconstitutional on its face because: it fails to provide constitutionally sufficient notice as to what conduct is prohibited; it impermissibly imputes the conduct of third parties (the other members of the enterprise) to the defendant; it fails to assure that organized crime will be the subject of prosecution; and it impermissibly predicates a defendant's criminal liability on the basis of his status. Pagan also argues that the VCAR was unconstitutionally applied in this case because the district court failed to require proof of temporal, relational, and/or quantitative relationships that Pagan asserts were required by various elements of the VCAR, and because the district court failed to apply the jurisdictional element of the VCAR to require that the enterprise be engaged in interstate commerce at the time the underlying violent crime was committed.

"Virtually all circuits in recent years have addressed constitutional challenges to criminal statutes [raised for the first time on appeal] and have either refused to address them because the defendants had neglected to raise them below, or decided to reach them only upon determining that the lower court's failure to address them constituted 'plain error.'" *United States v. Baucum*, 317 U.S. App. D.C. 63, 80 F.3d 539, 541 (D.C. Cir.

1996) (per curiam)(citing cases). There is no reason why Pagan's constitutional challenges could not have been raised below, where he had ample opportunity to raise them and where the district court would have had the opportunity to address them. n11 Accordingly, we find that Pagan waived these challenges. *See United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995); *United States v. Mennuti*, 679 F.2d 1032, 1036 (2d Cir. 1982).

n11 Similar challenges to the VCAR have been made in several cases in this Circuit, many of them prior to the trial of the case at hand. See, e.g., Torres, 129 F.3d at 717 (raising facial Commerce Clause challenge to § 1959); *Cutolo*, 861 F. Supp. at 1145 (raising facial and as applied vagueness challenges to § 1959); *United States v. Lee*, 862 F.Supp. 1129, 1138-39 (S.D.N.Y. 1994) (raising a vagueness challenge to § 1959); *United States v. Rahman*, 1994 U.S. Dist. LEXIS 10151, at *7, No. S3 93 Cr. 181, 1994 WL 388927, at *3 (S.D.N.Y. July 22, 1994) (challenging indictment under § 1959 for failing to inform defendant of the essential nature of the racketeering enterprise); *United States v. Soler*, 1998 U.S. Dist. LEXIS 4666, No. 94 Cr. 533, 1998 WL 167327, at *3 (S.D.N.Y. Apr. 9, 1998) (raising claim that to convict under § 1959, the Government must prove predicate acts for the racketeering enterprise element); *United States v. Booth*, 1999 U.S. Dist. LEXIS 19190, No. 99 Cr. 378, 1999 WL 1192317, at *3c-*6 (S.D.N.Y. Dec. 14, 1999) (raising facial and as applied vagueness challenges to § 1959).

Moreover, even assuming these challenges were not waived and assuming arguendo that it was plain error not to address them, we find that any such putative error did not "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. None of the various notice problems raised by Pagan are problems alleged to infect the charges of murder and conspiracy, based on Connecticut law, of which he was convicted. None of Pagan's arguments raise the possibility that he could not have known that he was committing a very serious felony when he participated in the murder of Edwin Ramos. All of the challenges go to the issue of federal jurisdiction. The only issue hinging on the success of Pagan's challenges, therefore, is whether he should have been tried in federal or state court. We do not find that this issue implicates the fairness, integrity or public reputation of judicial proceedings in the circumstances of this case. n12 Thus, the fourth prong of the *Olano* plain error inquiry is not satisfied here. Accordingly, in our judgment we cannot disturb defendants' convictions under § 1959 on the basis of these constitutional challenges raised for the first time on appeal.

n12 We note further that in reviewing Feliciano's sufficiency of evidence claim, we have given limited review to the jury instruction issue with respect to the VCAR's racketeering element, to the issue of how an enterprise acts, and to the issue of predicate racketeering acts.

CONCLUSION

We have considered all of appellants' other arguments and find them to be without merit. The judgment of the district court is affirmed in all respects.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Roseann B. MacKechnie,
Clerk

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of November, two thousand.

Docket No. 99-1289, 99-1290, 99-1318

USA,

Appellee,

v.

FELICIANO, *et. al.*,

Defendants-Appellants

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants, Ruben Feliciano and Nelson Gonzalez,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing be DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
ROSEANN B. MacKECHNIE, Clerk
By:

_____

Beth J. Meador, Administrative Attorney